Supreme Court of the United States

OCTOBER TERM, 1933

No. 338

CONRAD WOLFFLE,

Appellant,

vs.

UNITED STATE OF AMERICA,

Appellee.

BRIEF OF THE APPELLANT.

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No. 338

CONRAD WOLFLE,

Appellant,

vs.

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Appellee.

BRIEF OF THE APPELLANT.

Upon the petition of the appellant, the Supreme Court of the United States on October 16, 1933, granted a writ of certiorari to the United States Circuit Court of Appeals for the 9th Circuit, "limited to the question as to what law is applicable to the determination of the question of privilege which was raised at the trial."

SUMMARY OF FACTS.

This was a criminal prosecution of the defendant Conrad Wolfle for alleged violation of Section 215 P. C. forbidding the use of the mails to defraud. The indictment contains six counts. It sets forth an alleged scheme to defraud by organizing a corporation under the laws of Alaska, known as the Cantu Mining Company, and the sale of stock in said company by means of newspaper and circular advertising and correspondence, and by personal misrepresentation by said defendant and his agents, each charge being based on a specific letter sent through the mail. Count V was dismissed. The jury returned a verdict of not guilty as to Count VI.

On the trial of the cause the trial judge, over the objection of defendant's counsel, received the testimony of the witness, Grace Snyder, the appellant's secretary and private stenographer, who was permitted to prove the contents of a letter from appellant to his wife. This was a private, confidential letter from appellant in Seattle to his wife at Spokane, dictated to his stenographer, who read this undated letter into evidence from her stenographic notebook which she surreptitiously abstracted from her employer's office during appellant's absence,

In this letter, after telling his wife the earnest satisfaction he obtained from the report that his little daughter, Virginia, was on a school program in Spokane, and that he was proud of her, and further speaking of the result of his examination by a doctor and the fact that the doctor told him that he should leave his business for awhile and take a long rest, he stated, "I talked to a banker the other day, he said 'You have done as much as most people do in two years. It's hard to break in;' but I am going to break in, and whenever I do, I am going to rob every last one of them blind. You bet your last bottom dollar, as ever," etc. (Letter found in Statement of Facts, pp. 95 and 96.)

The prejudice which resulted from the reading of such a letter to the jury is immeasurable and may easily have been the deciding point in the minds of the jurors resulting in his conviction, and yet the language may have been entirely figurative and not at all intended to convey the meaning which the words might imply, if taken literally. In the language of the hardy miner, he may have intended to pit his energy and ingenuity, if not his ability, against that of the wily banker. To a stranger, the juror, it may have contained, and was no doubt construed by him to contain a threat and determination to commit a crime. Although the intimacy of

the letter when referring to his family affairs and his personal health does not impel the discerning mind to attach a malevolent meaning to the concluding phrases of the letter, nor even invite one to translate them literally, yet to a juror hearing it read to him under the formal and solemn circumstances of courtroom atmosphere, it could not escape having a most damaging effect entirely unwarranted by its meaning.

It is earnestly contended that the admission of this letter into evidence before the jury by the court below constituted prejudicial error and that the said letter was inadmissible under the law applicable to privileged communications, as well as the secondary nature of the evidence.

HISTORY OF THE RULE.

The principle of privileged communications is one of long standing. It had its origin—or at least it occupied an important part—in the Roman law. Under that system of jurisprudence the privilege was much more extensive than under our common law. No member of a family could testify against another. The privilege of *testimonium domesticus* rendered inadmissible the testimony, not alone of the husband and wife, but that of the parents, the

sons and daughters, and all those within the family circle.

The public policy which gave rise to this comprehensive privilege was the basic Roman regard for the sanctity of family life. It was conceived as a safeguard against the corruption of domestic relations. Family life in the Roman state was recognized as a relationship requiring the fullest domestic confidence—*uberrima fides*, the preservation of which was deemed superior to the settlement of particular controversies, or even to the punishment of particular offenders.

Digest Pandects, XXII, Title V, Secs. 4, 5, 6, 9, and 24.

There was another and a closely kindred privilege in the Roman law which conferred immunity on the part of the master against testimony by his servant. It is therefore to be observed that Roman law went much farther than our own in recognizing the sanctity of a confidence, whether that confidence be one expressed by a husband to his wife, by a business man to his associate, or by a client to his attorney. Many distinguished jurists of our time, including Taylor in his famous treatise on the "Law of Evidence," regret that the privilege is not extended to all communications which were made for

the purpose of being kept confidential regardless of whether it be to a friend, a business associate, or to whomsoever. (See Taylor on "Evidence," Sec. 916, p. 622.)

Whatever may be said of the barbarity of the Turks and Saracens, their law and the law of Moslem nations conferred complete immunity on all the testimony as to communications between relatives of first and second degree, husband and wife, and master and slave. *The Hedaya*, Vol. II, Art. XXI., Sec. 2.

Under our law this privilege has much the same function as under the Roman code. It depends upon the same policy of the preservation of the home and of the marital relationship. Our Anglo-Saxon jurisprudence entertains just as solicitous a regard for the mutual fidelity of married life as did that of the Romans. While it is true that the privilege defined by our common law does not go to the extent of Roman jurisprudence, an ever-increasing number of our judges express reluctance in many cases at the compulsory disclosure of secrets learned under circumstances of the strictest confidence. Evidence of this character has been compared to, and ranked with, confessions wrung by means of the "third degree," and

has been said to be productive of greater evils than the failure to punish the particular offense involved.

A study of Roman history compels the observation that the strength and energy, and the amazing duration of Roman world-wide empire, were founded primarily upon the emphasis upon wholesome family life and the virility of Roman family units. The decline of that Empire, in no little part at least, may be and generally is traced to the dissolution of the bonds of family discipline and affection and to the disintegration of family life under Roman civilization.

THE QUESTION AT ISSUE.

The question at issue is whether in courts of the United States it is proper and competent, over the objection of the defendant, to compel the disclosure by the defendant's secretary and stenographer of the contents of a letter dictated by him in Seattle to his wife in Spokane. Do the contents of such a letter come within the privilege conferred upon the defendant by the law of the land, or is that privilege forever lost to him by reason of his having employed a stenographer for the purpose of mechanically reducing it to writing?

At the trial the defendant, through his counsel, objected to the proof of the contents of this letter on the ground that it was an invasion of the privilege conferred upon him by law, that it was a violation of the statutes of the State of Washington, and that in any event, the original not having been produced or accounted for, the stenographer's notes were not the best evidence.

Appellant has insistently urged throughout these proceedings that the letter in question and its contents were privileged as being a communication from himself to his wife; that his wife under the law was not a compellable witness and could not have been required to produce the communication; that the stenographer in the mechanical processes of transcribing her notes and reducing them to writing was nothing more than the *alter ego* of the defendant; that she acted for him and as his agent, employee and representative; that she was nothing more than a mechanical hand—in the language of the cases "an organ," "a medium," "an instrumentality" for the transmission of the communication.

The Privilege at Common Law—Its Scope and Purpose.

It has always been a settled principle of the common law from its very inception that neither the husband nor wife would be permitted, either in a civil or a criminal case, to testify one against the other. This privilege is one of several such privileges embodied as one of the fundamental principles of the common law. Other privileged communications within the same category are those of attorney and client, in modern times physician and patient, and communications of state officials. All of these particular privileges are founded upon considerations of public policy. They were not, as some courts have erroneously supposed, exceptions to the broad requirements that every witness in a court of law was compelled to disclose every fact within his testimonial knowledge. On the contrary, they were fundamental in the law. This privilege is as basic in the common law as for example the requirement of adequate consideration in the law of contracts.

The policy subserved by the privilege of communications between husband and wife was based upon the principle that the happiness of family life depended upon the inviolability of domestic confi-

dence and that the unhappiness occasioned to society by invading its sanctity and compelling public disclosures of confidential communications between husband and wife would be a far greater evil than the non-disclosure of the intimacies of family confidences.

Compulsory disclosure of such highly intimate and confidential family relationships was deemed to be destructive of the bond of mutual confidence and unquestioning trust essential to the peace and happiness of domestic relations. Society has a deeply rooted interest in the preservation of the peace of families and the maintenance of the sacred institution of marriage and in the preservation against violation of those hallowed confidences inherent and inseparable from the marital status.

The public policy involved was one that seeks to preserve inviolate the peace, good order and limitless confidence between the heads of the family circle so necessary to every well-ordered civilized society. (*Coke on Littleton, 6 B, 2 Kent's Commentaries*, 179 and 180.) (*Wigmore*, Sec. 2332.)

Taylor, in the 11th edition of his treatise on "Evidence," Vol. I, pp. 617-18, states the broad rule of privilege and the purpose of the particular

privilege as to communications between husband and wife as follows:

> "The law excludes or dispenses with some kinds of evidence *on the grounds of public policy*, because it is thought that great mischief would probably result from requiring or permitting their admission * * *. The matters which the law says shall not be the subject of evidence in courts of justice are: (1) Communications which have passed between husband and wife during marriage. * * * This rests upon the obvious ground that the admission of such testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not destroy, that feeling of mutual confidence which is the most endearing solace of married life. The protection is not confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of the law is placed upon all communications of whatever nature which pass between husband and wife. It extends also to cases in which the interest of strangers are solely involved as well as those in which the husband or wife is a party on the record."
>
> *Reeves vs. Wood*, 34 L. J. 1864, M. C. 15.
>
> *Public vs. Blady*, 22 Cox C. C. 715.
>
> *O'Connor vs. Majorbanks*, 1842, 4 Man. & G. 435, 11 L. J. C. P. 267.

Leach vs. Director H. L., 22 Cox C. C. 721, 1912, again states the common law. The defendant was indicted for incest and the wife was called to testify against him. Her testimony was received by

the court below, but the House of Lords reversed the holding on the ground that she could not be compelled to testify against her husband, without his consent. Earl Loreburn, Lord Chancellor, said:

> "I do not pretend to conjecture whether the decision * * * is *pro bono publico* or not. Because on the one hand it is very desirable that in a certain class of cases justice should not be thwarted by the absence of the necessary evidence, but upon the other it is a fundamental and old principle to which the law has looked that you ought not to compel a wife to give evidence against her husband, especially in matters of a criminal nature * * *."

Lord Atkinson said:

> "I think that the principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country."

Greenleaf summarizes the rule succinctly when he says:

> "It is essential to the happiness of social life that the confidence subsisting between husband and wife should be sacredly protected and cherished * * *, and to break down or impair the great principles which protect the sanctities of that relationship would be to destroy the best solace of human existence." (15th Ed., Sec. 334.)

It is only in modern times that the physician has come into the important function which he

now occupies by virtue of the progress of chemistry, biology and science. Physicians today exercise a commanding influence over the life of society and we find this privilege, either by common law or statutory enactment, recognized throughout the English speaking world.

The same considerations of public policy surrounded officials of the sovereign or of the state with the same cloak of privilege as to their communications.

THE EFFECT OF STATUTE.

It is unnecessary to concern ourselves over the question of whether the applicable law is that of the common law or of the law of the Territory of Washington at the date of its admission into the Union. There is no essential distinction between the common law and the law of the State of Washington, which is the same today as it was at the date of its admission into the Union. Our statute is but declaratory of the common law. The common law recognized the privilege of communications from husband to wife. Our statute preserves that privilege. The common law for various reasons —and among others for the reason that parties to an action were always incompetent—prohibited

the wife from testifying in her husband's favor and upon his request. This incompetency has universally been removed; so that today by statutes the wife is a competent but not a compellable witness, that is to say, she may never, without her husband's consent, testify against him as to any communication made to her, but she may at his request testify in his favor. Thus the common law privilege by statute is preserved and there is added to it the right to have the benefit of the testimony of one spouse upon the consent of the other.

Were there a question as to the applicability of state statute instead of the common law, it is settled that in courts of the United States the common law governs.

Ins. Co. vs. Shaeffer, 94 U. S. 457.
Diggot vs. Glen, 51 Fed. 381.
Rosen vs. U. S., 245 U. S. 467.

There is, however, no conflict between state statute and the common law.

Decisions Recognizing and Applying the Privilege.

The privilege as to communications between husband and wife is so closely related to the privilege as to attorney and client and physicians and

patient that we find all three treated alike in the cases. There is a conflict in the decisions as to the admissibility of such communications where testimony thereof is procured from witnesses other than the husband or the wife, or the attorney and the client, or the physician and the patient. As the cases are analyzed, it will be observed that this conflict turns upon whether the particular court adopts one or the other of two tests: *First,* that if the communication originates in confidence and under circumstances intended to be privileged, and if the privilege is not consciously surrendered, the privilege will be enforced and the communication excluded; or, *second,* regardless of the privileged origin or the confidential nature thereof, admissibility is purely a matter of custody of the communication. If it has been filched, purloined, or abstracted from the husband or the wife by any means, surreptitious or otherwise, even though in violation of the confidence inherent in the nature thereof, the communication will be admitted. The first line of cases enforcing the privilege seek to consult the nature and the purpose of the communication and to carry out the policy of the principle of law. The second line of cases in conflict therewith disregard the purpose and the policy and erroneously suppose it to have been in derogation of the com-

mon law. In those decisions any circumstance, however slight, is seized upon in order to defeat the purpose which developed the privilege as one of the constituent elements of the common law.

The principle of privilege in question was illustrated and applied in the leading case of *Gross vs. State* (Cr. Ap., Tex. 1911), 135 S. W. 373. The defendant there had written a letter to his wife which contained the expression, "For God's sake, get Emory and Maude out of the way, for they could put me to death." The lower court permitted the mother-in-law to testify that she had surreptitiously found and read the letter, and she saw her daughter burn it. This testimony was admitted over the objection of the defendant that it was a privileged communication and that its admissibility would be to compel the wife to testify against her husband. The trial court admitted it, however, upon the oft-repeated dictum that evidence, even though illegally or improperly obtained, is nevertheless admissible, and that the court will not inquire with too much nicety as to how it was procured, and also that the mother-in-law could testify just the same as if she had overheard a confidential conversation between the husband and wife.

The higher court, however, reversing the case, held that the admission in evidence of the contents of this letter was reversible error. The court in its opinion examined practically all of the cases on this subject, including privileged communications between attorney and client, as well as those between husband and wife. The court recognized the conflict among the decisions, but it repudiated the doctrine that such a privileged communication was subject to a dissolution of the privilege the moment it fell into the custody of strangers to the confidence. Space will not permit an extensive quotation from the case. It is sufficient to point out that the court adopted the principle enunciated by Justice Shiras in the distinguished case of *Liggett vs. Glenn*, 51 Fed. 381, in which the criterion invoking the question of privilege was expressed as follows:

> "The admissibility of the communication in our judgment is not dependent upon the manner in which control thereof is obtained * * *, but upon the inherent character of the communication itself. If the * * * statement sought to be put in evidence was made by reason of the confidential communication, it becomes a privileged communication and as such it is not competent evidence * * *."

Applying that principle to the case at bar, the Texas court declared:

"If this is true as to the relation of attorney and client, how much stronger the reasoning when privileged communications arise between husband and wife. Not minimizing the relations between client and attorney, but we do say that the communication between husband and wife is far more sacred and to be the more strongly guarded than that of the relation between attorney and client. * * *. It makes no difference in this case that Mrs. Maude Colman obtained possession of the letter in the manner that she did; that possession and her knowledge of the contents of the letter did not rob it of its confidential privilege and character. * * * To hold (otherwise) would be in effect to abrogate the statute and break down the purpose of the law, which was to shield and protect privileged matters occurring between husband and wife."

Cases enumerated in the decision as supporting the principle adopted were:

Cole vs. State, Tex., 88 S. W. 341;

Burke vs. State, 77 S. W. 451, Tex.;

Gant vs. State, 116 S. W. 801;

Mitchell vs. Mitchell, Tex., 15 S. W. 705;

Mercer vs. State, Fla., 24 So. 154;

Connell vs. Hudson, 53 Mo. App. 418;

Commonwealth vs. Sapp, Ky., 14 S. W. 834;

Stein vs. Bowman, 13 Pet. 209, 10 L. Ed. 129;

Sanders vs. Hendrix, 5 Ala. 224;

1 Greenleaf on Evidence, Sec. 254, Sec. 337 and 338;

Cook vs. Grange, 18 Oh. St. 526 to 531;

Brown vs. Wood, 121 Mass. 137;

Maynard vs. Vinton, 59 Mich. 139, 26 N. W. 406;

Jacobs vs. Hessler, 113 Mass. 157;

Hitchcock vs. Moore, Mich., 37 N. W. 914;

Smith vs. Potter, 27 Vt. 304, 65 A. D. 198;

Brock vs. Brock, 116 Pa. 109, 9 Atl. 486.

A case cited in the opinion, that of *Mercer vs. State*, 40 Fla. 716, 24 So. 154, contains a well-reasoned analysis of the principles to be applied in construing the question of privilege as to a communication between husband and wife. The Florida court also recognizes that some courts admit or reject proof of the communication, depending upon whether the communication is in the original custody of the husband or wife, or has escaped therefrom. The court rejects that test, but applies the more enlightened rule:

> "* * * the policy of the law that forms the foundation of the general rule, is far more strongly upheld and observed by those authorities that recognize and declare certain classes of communication to be privileged from the inherent character of the communication itself, and that in such cases the privilege attaches to the communication itself and protects it from exposure in evidence wheresoever or in whosesoever hands it may be."

A Kentucky case, that of *Scott vs. Commonwealth*, 23 S. W. 219, in a prosecution for manslaughter, held:

> "The evidence in this case shows the letter in question was secured from appellant's wife by a brother of the deceased and then came into possession of the Commonwealth attorney. But it seems to us, whether given up by her voluntarily, or obtained against her will, it was a disclosure of what had been written by her husband in the privacy and confidence of the marital relation * * *."

The same principle is illustrated in the case of *Henderson vs. Chaires*, 25 Fla. 26, 6 So. 164.

In *Selden vs. State*, (Wis.), 42 N. W. 218, the court refused even to allow secondary proof of the existence of a communication by reason of the absolute privilege attaching to the relationship of husband and wife.

In *Wilkeson vs. State*, (Ga.), 1893, 17 S. E. 990, the court held that a letter received by the wife from her husband could not be delivered by her to another person and by him put in evidence.

One of the most instructive cases in a state court on this subject is the recent case of *State vs. McKie*, (Ga.), 1927, 140 S. E. 625. The case contains a summary and analysis of the decisions on both sides of this question throughout the United

States, and after weighing the conflict in authorities adheres to the principle of giving effect to the object and purpose of the privilege.

> "Our statute makes such evidence incompetent and inadmissible. It does not simply proscribe the channel through which the evidence reaches the jury, but it makes the evidence itself inadmissible * * *. This ruling does not conflict with the decisions of this court, which hold that a party who hears a communication between husband and wife can testify touching such communication."

This court clearly seized an important distinction which has escaped many of the courts which adopt the custody rule. The prohibition of the statute is against proof of the communication. The statute is not merely directed against the competency or incompetency of certain witnesses, but over and above the question of competency are the provisions of the statute (merely declaratory of the common law) which bar proof of communications from husband to wife. As the court again declared:

> "So the introduction of the letters from the wife to her husband and from her to her attorney was not admissible upon the ground that our law makes such confidence incompetent as well as it makes the wife or husband incompetent to testify against the other."

Same Rule and Principle in Case of Attorney and Client.

We have already adverted to the principle identical in its purpose and origin with that of husband and wife, that no attorney may, during or after his employment, reveal any communication, oral or documentary, made to him on behalf of his client. This privilege is likewise founded in public policy. It is deemed in the interest of justice that laymen unskilled in learning may be able to communicate freely with those learned therein. The privilege extends not only to the attorney, but to the attorney's secretary, stenographers or clerks.

Taylor, in his work on "Evidence," Sec. 920, p. 626, states the rule thus:

> "This protection, though confined to communications between client and adviser, extends to all necessary organs in which such communications are effected, and therefore an interpreter or an intermediate agent."

The extension of this protection to the clerks and secretaries of the attorney was a modern development of the common law.

> "Formerly it was thought that a barrister's or solicitor's clerk was not within the reason and exigency of the rule; but as the principles are unable to transact all their busi-

> ness in person they are under the necessary of employing clerks, and it has since been held that such clerks cannot be permitted to disclose the facts coming to their knowledge in the course of their employment unless the barrister or solicitor might have been interrogated respecting them." Citing *Walker vs. Wildman*, 1821, 6 Madd. 47, 22 R. R. 234, 56 E. R. 1007.

In calling attention to this extension of the privilege to include clerks and agents, Taylor, in Sec. 946, says:

> "On a like principle of public policy no witness whether a peer, a member of the House of Commons, an officer of either House or a shorthand reporter can report without the permission of the House having been first obtained to disclose in the court of justice what took place within the walls of Parliament."
>
> *Plunkett vs. Cobbett*, 1804, 29 How. St. Tr. 71;
>
> *Solomons vs. Chubb*, 1852, 3 Carr & K., 75;
>
> *Forbes vs. Samuel*, 1913, 3 K. B. 719, 82 L. K. J. B. 1135.

In *Taylor vs. Foster*, 1825, 2 C. & P. 195, 172 E. R. 89, Best, C. J., granted a non-suit, because the only evidence in support of the plaintiff's action depended upon the testimony of the opposing attorney's clerk. He held that upon the ground that attorney's must employ clerks and that they cannot transact all of their business in person, the

principle of privileged communications extended to the clerk as well as to the attorney.

In *DuBarre vs. Livette*, Peake N. P. C. 78, an interpreter was excluded from testifying to a communication between the attorney and client.

In *Parkins vs. Hawkshaw*, 2 Stark. 239, 171 E. R. 633, an agent or employee of the attorney was likewise for the same reason excluded.

The clerk of an attorney was rejected as a witness in *King vs. Upper Bodington*, 1826, 5 L. J. M. C. 10 (1827).

The cases with reference to the privileged communications between attorney and client disclose a very board and comprehensive application of the principle. Law clerks and law students are exempted from testimony and come within the rule of privilege where they are engaged in assisting the attorney who is supervising them. *Wartelle vs. Novogard*, R. I. (1927), 137 Atl. 776. So also *Hunt vs. Taylor*, 1850, 22 Vt. 556; *Sibley vs. Wife*, 1867, N. Y. 180; *In re Arnott*, 1888, 60 L. T. N. S. 109. And a case in point where the stenographer of an attorney was held to come within the privilege is *State vs. Brown*, 1896, 2 Marv. (Del.) 380, 36 Atl. 458. Where the court held that the attorney could not be required to disclose the facts coming to his

knowledge for the use of the State in its prosecution of the accused, nor can his private amanuensis or clerk. To do so would be prejudicial to the public interest and would in many cases defeat the ends of justice.

Privileged Communications Between Physician and Patient.

Just as the law recognizes the privilege of communications between husband and wife and attorney and client, it establishes a similar cloak of privilege between communications of a patient to his physician. This privilege is of statutory creation and is not embedded in the common law, as are the other privileges referred to. Nevertheless, the courts do not take the position which is frequently asserted with reference to statutes in derogation of the common law, that since the tendency is to prevent a full disclosure of the truth, such a statute must be strictly construed. On the contrary, anxious to preserve the principle involved in the rule, courts very uniformly include within the privilege not only the patient and the physician, but communications made to the physician's nurse, technician or X-ray specialist, or a communication made by the patient to the physician in the presence of any of the physician's necessary assistants. If this

is true with respect to a statutory privilege, how much greater is the reason for applying the same liberal and enlightened policy with regard to the privilege of husband and wife which has grown up as a very part of the common law itself. How false, therefore, are the reason and the premises in the decisions of those cases which follow the rule of *Hammons vs. State*, (Ark.), 84 S. W. 748, 68 L. R. A. 234 the line of cases relied upon by the Government and the Circuit Court of Appeals as the basis of its decision.

A case which illustrates the application of this rule to the relation of physician and patient is that of *Culver vs. Union Pacific*, (Neb. 1924), 199 N. W. 794. The defendants there sought to introduce the testimony of the nurse of the plaintiff's doctor as to records of a Wasserman test received from a laboratory. This offer of proof was rejected by the trial court and the case was affirmed upon appeal to the Supreme Court of Nebraska. The Court said:

> "A nurse is often necessarily present at conversations between the patient and the doctor with respect to the ailment or condition of a patient and little good would be subserved if the lips of the doctor's might be sealed by the statutes as to such conversations but the nurse or attendant might freely testify to all

> that was said and everything that was done. The purpose of the law is to protect the right of privacy, and while its scope should not be unduly extended, its very intention might be completely thwarted by the admission of testimony from this class of witnesses."

The Supreme Court of Mississippi in 1932, in *Power & Light vs. Jordan*, 152 So. 483, likewise expressed a similar rule. The partner of a physician there was forbidden to testify to anything that he learned from his partner who treated the plaintiff. With regard to the nurse in the office, the Court declared:

> "Where a nurse gains information by being present and assisting a physician and overhears conversations between the patient and the physician, her testimony is incompetent. A physician must have the assistance of a nurse * * *, and to permit her to testify would be to annul the statute."

The Court then calls attention to the rule expressed in Sec. 2381, *Wigmore*, 2nd Ed., in which Wigmore points out an important exception to the rule that a third person who overhears a confidential conversation (or obtains it) can testify concerning it, thus: "Except so far as the third person is the agent." A nurse or assistant is, of course, an agent of the physician but Wigmore is speaking not alone of the privilege obtaining between the

physician and the patient but of the other privileges as well.

It is apparent that the defendant's stenographer was not a third person or a stranger in the category of those cases which permit an eavesdropper to put into testimony communications surreptitiously overheard. She was an agent, a servant, and a representative of the defendant, and she comes plainly within the spirit of the exception referred to by Wigmore.

This same principle has been recently enforced by the Supreme Court of this state (State of Washington) in the case of *Toole vs. Franklin Investment Co.*, 158 Wash. 696, 291 Pac. 1101. There also it sought to introduce certain hospital records in evidence against the plaintiff. The lower court granted this permission, but the Supreme Court declared this was error, holding:

> "These records were objected to upon the two-fold ground that they were hearsay and privileged. The rule seems to be well established that such records are hearsay testimony, and also that so far as they tend to disclose what the physician thus learned, they are protected by the rule of privileged communications, as much so as if the physicians were being examined as witnesses in person."
>
> "A nurse is often necessarily present at conversations between the patient and the doc-

tor with respect to the ailment or condition of the patient, and little good would be subserved if the lips of the doctors might be sealed by the statute as to such conversations, but the nurse or attendant might freely testify to all that was said and everything that was done. The purpose of the law is to protect the right of privacy, and, while its scope should not be unduly extended, its very intention might be thwarted by the admission of testimony from this class of witnesses." *Hommyach vs. Prudential Ins. Co.*, 1909), 194 N. Y. 456, 87 N. E. 76.

Chic., Lake Shore Ry. vs. Walas, Ind. 1922, 135 N. E. 150;

Colorado Fuel & Iron vs. Cummings, 1919, 46 Pac. 875;

Owens vs. Kansas City, 1920, Mo., 225 S. W. 234;

Sparer vs. Travelers, 1919, 173 N. Y. S. 673;

Price vs. Standard Life, Minn., 95 N. W. 1118.

FEDERAL CASES SUPPORTING THE RULE THAT A PRIVILEDGED COMMUNICATION REMAINS PRIVILEDGED, IRRESPECTIVE OF CUSTODY.

Justice Samuel F. Miller, then sitting as Circuit Judge in the District Court in Missouri in 1887, later a member of this Court, in the now famous case of *Bowman vs. Patrick*, 32 Fed. 368, decisively rejected the third party custody rule. The case was one where an administrator for the estate of the deceased, who procured some letters favorable to

the interest of adversaries of the deceased, furnished them to the other side in litigation then pending. Justice Miller was shocked and surprised to note that there were authorities holding that "where this evidence can be got at either by obtaining possession of the letter, or some method of overhearing the communication by some third party between the husband and the wife, that this evidence can be used." He held:

> "I am quite clear that the wife has no right to publish these communications; that she would not be permitted to produce the letter if she were a witness on the stand; that she could be enjoined from producing the letter if she were supposed to be hostile to her husband; and that the executor, in a voluntary and hostile spirit to the husband, who has letters, has no more right to produce them and deliver them over to the husband's prejudice than the wife has."

We might amply paraphrase this language and apply it to the facts of our case. It would read thus:

> "It is quite clear that Mrs. Wolfle has no right to publish this communication (letter); that she would not be permitted to produce the letter if she were a witness on the stand; that she could be enjoined from producing the letter if she were supposed to be hostile to her husband; and that the stenographer, in a voluntary and hostile spirit to the husband, who has the letters, has no more right to produce the letters and deliver them over, to the husband's prejudice than the wife has."

This question received a great deal of consideration from the late Justice Shiras in the case of *Liggett vs. Glenn*, 1892, 51 Fed. 381. The privilege at issue there was as to a communication between attorney and client, but the case has been recognized as an authority wherever the question of privileged communications has been raised. The defendant there in a communication had signed a written contract with an attorney, agreeing to pay him certain fees in defending suits pending against him for recovery of assessments on the stock of a a corporation. Subsequently the attorney filed the communication in probate as a voucher for a claim for fees. From this probate record another attorney obtained it and used it in a suit against a co-signer as evidence of the latter's liability on his stock. The district (then circuit) court below admitted proof of this communication in evidence, but the Circuit Court of Appeals, through Justice Shiras, reversed this ruling. The Circuit Court held that the admissibility of such a communication did not in any wise depend upon the manner in which possession thereof was acquired from the attorney, but that it was predicated upon the inherent character of the communication itself. Once privileged, it remained privileged in the absence of some unequivocal act on the part of the client waiving the privilege. Judge Shiras declares:

"In order that there may be perfect confidence established between client and counsel, and upon considerations of enlightened public policy, the rule has been established that the client may freely communicate to his counsel all facts connected with the subject out of which grows the relation in question, and that the communication, thus confidentially made, cannot be used in evidence against him unless he himself, by some unequivocal action on his part, deprives the communication of its privileged character, and thereby renders it competent evidence against himself. To fairly carry out the real purpose of the rule, it must be held that privileged communications are in and of themselves incompetent, regardless of the mere manner in which it is sought to put them in evidence * * *."

"The admissibility of the communication, in our judgment, is not dependent upon the manner in which control thereof is obtained from the counsel, but upon the inherent character of the communication itself. If the admission or statement sought to be put in evidence was made by reason of the confidential relationshp existing between client and counsel it becomes a privileged communication and as such it is not competent evidence against the party. Its competency is not dependent upon the mere manner in which knowledge thereof may be obtained from counsel. The principle forbidding its use is not adopted as a mere rule of professional conduct on the part of the attorney. It confers a right upon the client for his protection and advantage, and which he alone is authorized to waive. It will not do to hold that the communication loses its confidential and privileged character if knowledge thereof can be obtained by means which

do not involve the counsel in a breach of professional duty. For illustration, a letter is written by a client to his attorney containing statements of a privileged nature. His counsel, having this letter on his person, meets with an accident, causing his death. *Third parties in this way become possessed of the letter and from them it passes to the possession of the adversary party. Has this letter lost its privileged character and become competent evidence against the writer simply because it passed from the possession of his counsel, to whom it was written, without fault on the part of the attorney? Suppose that, upon the trial of a cause, an attorney is sworn as witness and he is asked to produce a letter written him by his client. He refuses on the ground that it is a confidential communication. The trial court overrules the objection and compels the production of the letter which is filed as part of the evidence in the cause. An appellant court reverses the ruling of the trial court on this question, holding that the letter was privileged and sends the case back for a new trial. On the second hearing, the attorney is not called as a witness but the clerk, in whose custody the letter was placed on the first trial, was summoned by a subpoena duces tecum, and required to produce the letter in order that the same may be read in evidence.* Is it possible that this letter, being a confidential communication between client ad counsel, can be rightfully put in evidence upon the theory that the possession thereof was obtained without fault on the part of the attorney. The argument, founded upon the assumption that the admissibility of confidential communications between client and counsel is dependent solely upon considerations of the duty of counsel not to make known that which was communicated to him professionally, is, in

> our judgment, faulty, in that it ignores the main purpose of the rule, which is that the client shall be at liberty to freely communicate to his attorney knowledge of all matters connected with the business in hand upon the assurance that confidential communications thus made are privileged and cannot be used in evidence against him, unless he deprives them of their privileged character."

It will be noted that in this decision the court called attention to the state statute, analyzed it, and held pursuant to the case of *Ins. Co. vs. Schaefer*, 94 U. S. 457, that state statutes did not control the competency of this sort of testimony, but that in any event the question was unimportant because the state statute was merely declaratory of the common law.

A similar case involving privilege between a physician and patient was decided in 1895 in the case of *Drier vs. Continental Life*, 24 Fed. 670. There the plaintiff's husband, in an application for insurance, had made certain statements to his physician, which the physician in turn submitted to the insurance company. Upon the death of the plaintiff's husband and upon an action on the policy, the insurance company sought to put in proof of the statements. This proof, however, was excluded on the ground that the communication was one be-

tween patient and physician and was therefore privileged.

This Court, in *Connecticut Mutual vs. Schaefer,* 94 U. S. 457, has indicated the extent to which recognition will be accorded a confidential communication between the attorney and client, even if necessary to forbid an attorney to testify to the contents of a petition for divorce in a collateral proceeding.

The most recent expression of the courts of the United States upon the subject of privileged communication is that of *New York Life vs. Ross,* C. C. Apps. (6th Circ.), 1928, 30 Fed. (2) 80. There, in an action on a policy for accidental death, the insurance company sought to make use of a letter found by the executor in his possession, which letter was written by the deceased to his wife, which apparently tended to prove the defense of suicidal death. The court held that notwithstanding that the letter was found after his death with his will by his executor, that it was a privileged communication and that it was founded upon or made in consequence of the marital relation:

> "The incompetency thus arising continues after the marital relation has been terminated by death or otherwise and a document addressed by a husband to his wife and which has no rela-

> tion whatever to the issues in the suit but is written in recognition of the uncertainty of life and to be delivered after death, would seem to fall both within the spirit and the letter of the statute."

STENOGRAPHER IS AN AGENT AND REPRESENTATIVE AND NOT A STRANGER OR THIRD PERSON.

Wigmore, Sec. 2339, 2nd Ed., declares that "A third person overhearing a confidential communication may testify to it for the same reason recognized in the privilege for a client's communications with his attorney." Under that latter subject, Sec. 2336, he says:

> "One who overhears a communication (between attorney and client), whether with or without the client's knowledge, is not within the protection of the privilege."

The examples cited are such cases as that of *Cotton vs. State*, Ala., 6 So. 396, where a jailer overheard a conversation between the accused and his attorney and was permitted to testify thereto. We have already demonstrated that on the other hand the law protects a communication between the client and the attorney's secretary, clerk, assistant, or stenographer. It is thus plain, as we have heretofore pointed out, that Wigmore did not have in mind laying down the rule that a stenographer, a clerk, or an assistant to an attorney was or could

be within the category of a third person. A third person contemplated by the rule is plainly a stranger. A jailer is a third person but not a clerk, secretary, or an assistant of either the attorney or his client. If the cases cited in the opinion of the Circuit Court of Appeals, or in the Solicitor General's reply brief, be examined, it will be found that they turn altogether upon the assumption that the stenographer in this case is identically in the same category as a third person or a stranger in any one of the many cases cited either in the opinion or in the brief.

For example, in *People vs. Dunnigan,* 1910, (Mich.), 128 N. W. 180, a case frequently cited in support of the "custody" rule, i. e., the rule that it is not the privileged nature of the communication that governs but rather the person who has acquired custody of the communication, the court itself pointedly called attention to the exception we have mentioned. There, while the defendant was in jail awaiting trial on a minor offense, the sheriff ingeniously suspecting him guilty of a murder, prevailed upon a friend to visit him in jail and obtain from him a communication from the defendant to his wife. The defendant furnished his friend with a letter to his wife, which letter constituted practically the sole evidence upon the trial in which

he was convicted of murder. In sustaining the admissibility of this letter upon the custody theory, the Supreme Court especially exempted from the custody theory those communications which remained in the custody and control of agents or representatives of the parties to the privilege. The friend in that case who had acquired custody of the letter was therefore, in the judgment of the Michigan court, not in the same category as an agent or a representative. He was purely a third party. The decision in that case has been criticized by many courts, including the court of Georgia in the *McKie* case, *supra*. But whatever may be said of it, at its worst it constitutes no authority under the facts of our case. A reading of that case and of all of the cases which are cited adversely to our position will establish an absence of a representative capacity or a relationship of agency. None of the third persons who were conceived in the line of opposing cases to have been competent witnesses were in the category of agent, representative or employee. Here the witness, Grace Snyder, was the employee and agent of the defendant Wolfle. It was her specific duty to receive dictation in shorthand notes and transcribe them upon the typewriter. Her acts within the scope of her employment were the acts of her principal. Here custody of the letter and

of the notes thereof were in the contemplation of law the custody of defendant Wolfle. The defendant Wolfle had never parted with them. In the language of Taylor on "*Evidence*," heretofore referred to, and in the laguage of the cases cited therein, she was but the organ, the medium, or the instrumentality for the transmission of the communication. She was employed to do mechanically what the defendant Wolfle would otherwise have had to do manually by use of pen and ink.

Cases Cited in Opinion of Circuit Court and by Solicitor General Have No Application to Facts of This Case.

The cases bear upon the question of privilege between communications of husband and wife cited in the Solicitor's brief and in the opinion of the Circuit Court have adopted the test hereinbefore referred to: That the all-important consideration is the question of the custody in which they are fund. If they have escaped from the possession of the parties to the privilege, they are admissible. This test of admissibility we have heretofore explained is erroneous. It is predicated upon the assumption that the law of privilege should be narrowly construed in that it has a tendency to prevent the full disclosure of the facts and in deroga-

tion of the general law. This assumption is contrary to the truth. The privilege is a fundamental part of the common law. It exists for the purpose of preserving one of the most important institutions of society. In order to effect its benevolent purpose the privilege must be as broad as the subject matter with which it is concerned. It is true that in some cases it tends to prevent a full disclosure of some of the facts, but where this happens it is in response to a superior command of public policy. The language of Vice-Chancellor Bruce Knight in *Pearce vs. Pearce*, 1847, 16 L. J. Ch. 153, at p. 159, is here very appropriate.

> "The discovery, vindication and establishment of truth are the main purposes of the existence of courts of justice. Still for the obtaining of these objects, which however valuable and important cannot be as fully pursued without moderation, cannot be creditably pursued unfairly, or gained by unfair means, *not every channel is or ought to be open.* Truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much; and surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly, or worse, are too great a price to pay for truth itself."

State vs. Wilkins, 72 Ore. 77, cited in the opinion as the leading authority for the rule adopted by the Circuit Court below, has neither on its facts nor upon any of the principles announced therein, any application or similarity to the case at bar. There the defendant was charged with murder, having suspected the deceased with having harbored his (the defendant's) wife in his own home. The court found that there was complete estrangement between the wife and the defendant.

> "The letters taken from him and to which he objected on the ground that they were from his wife, were written by her, it would seem, after she and the defendant had become estranged from each other and were separated." (p. 82.)

That finding alone distinguishes that case from the case at bar. The law is universal that the privilege no longer survives for those communications between husband and wife after estrangement, separation, or divorce. Furthermore, the Supreme Court of Oregon distinguished the case from one invoking the rule of privilege upon the ground that the letter was from the estranged wife to her husband and that the privilege, if any, was the privilege of the wife and one that could not be claimed by the husband as the recipient of the communication. It is unnecessary to discuss the correctness of

this view, for it has some support from Wigmore, who speaks on the privilege as one belonging to the communicant. Many cases hold that the privilege is one which belongs to the marital entity, but in any event it is a sufficient answer to that case when cited by the Solicitor to point out that in the *Wolfle* case the communication in question was one written by the defendant Wolfle in Seattle to his wife in Spokane, hence the right of claiming the privilege was distinctly his.

Nor can the Solicitor derive any comfort from the case of *State vs. Nelson*, 39 Wash. 221, relied upon in the opinion of the Circuit Court. That case has not even the remotest bearing upon the case at bar in any of its facts. There was no communication there between the defendant and his wife. The defendant there in fact was not married. Paulina Smith had been separated and estranged from her husband in Alaska, and she took the stand to testify for the defendant, denying that the defendant lived in adultery with her. In order to impeach and discredit her, the State offered a communication which apparently had come into the hands of the prosecution from the estranged husband of the *witness*. This communication was not offered as substantive evidence against the defendant; its purpose was limited only to impeaching

the credibility of the witness on the stand. It was received for that purpose. It is plain that the defendant Nelson had no prerogative whatsoever to claim privilege in such a communication.

State vs. Falsetta, 43 Wash. 159, cited in the opinion, is a case of attorney and client where the latter openly in the courtroom and in the presence of peace officers, communicated with his attorney. The admissibility of such testimony is not questioned, but the cases have uniformly recognized that a communication from the client to his attorney, or to any of the attorney's clerks or assistants, is absolutely privileged. The Circuit Court in the case at bar recognized that the privilege of husband and wife is identical in its consequences with that of attorney and client. It failed, however, to perceive that a stenographer, clerk, or employee, is in a different category than a stranger or a law enforcement officer. The latter is a third party, a stenographer is not; and for this reason all of the cases unanimously hold that a communication between attorney and client is privileged, regardless of the presence of a stenographer, clerk, or employee. We need say nothing more about the *Rasmussen case* cited in the opinion than to point to the fact that its sole authority is the case of *State vs. Nelson*, just cited. That case is so completely distinguished

from ours that the *Rasmussen case*, relying upon it, can be no authority here. The California cases are equally wide of the mark. They are cases involving no debate over the principle that third parties or strangers can testify to communications voluntarily placed in their hands. The *Sneath case* is typical. There the defendant handed an open, unsealed letter to a sheriff, told the sheriff to show it to his wife and to resume possession of it. The sheriff carried out his instructions literally, and after having obtained the return of the letter from the wife, put it in evidence. No one would claim privilege where the defendant himself had failed to ask for it. In the *DeLeon case*, also cited, the defendant gave a letter to a deputy sheriff, being advised that it would be read by the sheriff and subject to the scrutiny of others than his wife. Under those circumstances he could not claim privilege. This is true also of the case of *Perry vs. State*, a case not of husband and wife, but of attorney and client. There the defendant, charged with robbery and murder, employed an attorney, who went out some miles from the county seat and dug diligently into the earth to uncover defendant's loot, and while possessing himself of the gold that he had found, the sheriff surprised him in the act. The attorney at once sought to

claim privilege, on the ground that the money belonged to his client, but the court naturally attached very little importance to the claim.

Commonwealth vs. Everson, 123 Ky. 330, is an eavesdropper case. It is a far cry from an eavesdropper case to the case of a husband's communication with his wife through the medium of his private secretary. The same thing is to be said of the case of *Commonwealth vs. Wakelin*.

We are not here concerned with a conversation in the wife's presence as in the *Fay vs. Guynon case*; nor a communication in the presence of the daughter, as in the *Lyon vs. Prouty case*; nor with the presence of a third party such as a real estate agent as in the *Long vs. Martin case*.

We need to devote but little attention to the Solicitor's citation of *State vs. Young*, 97 N. J. L. 501, 117 Atl. 713. The case was one where the defendant—after having robbed the deceased, stolen his automobile, and murdered him—upon his arrest, commissioned a third party to carry a message to his wife. The third party wrote down the message at the defendant's dictation. It was not signed by the defendant, nor was it his communication. In effect it was nothing more than if the defendant had said to the third party, "Go and tell my wife

so and so." Of course, under those circumstances the messenger would be a competent witness. There was no confidential communication involved. Here, however, the defendant Wolfle actually wrote a letter to his wife, a communication from husband to wife, which brings it within the rule of privilege. The only part played by the witness, Grace Snyder, was in reducing the defendant Wolfle's letter to writing. Wolfle, instead of writing the letter by hand, wrote it by means of his secretary and stenographer. To us there seems to be no analogy. There is nothing to suggest the relationship of agency or representative capacity on the part of Randall, the witness in the *Young case*. Had there been, we are satisfied that most courts and probably the New Jersey court, would have preserved the confidential privilege involved.

We have already pointed out the fallacy of the decision in *Hammons vs. State,* 73 Ark. 495, cited in the Solicitor's brief. There the husband, in jail, accused of a grave crime, wrote an incriminating letter to his wife and gave it to a negro visitor. The negro in turn gave it to the wife's father, who instead of giving it to the wife, gave it to the witness who proved its contents at the time of trial. That case adopted the "custody test" in total disregard of the purpose or policy of the law of privilege, or of

the confidential nature involved. It was erroneously supposed that the rule of privilege was in derogation of the common law and that it should be strictly construed. It is the leading case in support of the theory that any circumstance, however slight, should be seized upon to destroy the privilege. It is not, in our judgment, in harmony with sound reason, with enlightened public policy or accepted principles of law or weight of authority, and from the date of the decision it has been very much criticized —in fact, the case contains a vigorous dissent on the part of two of the judges of the court.

The case of *Hopkins vs. Grimshaw,* 165 U. S. 342, cited by the Solicitor, permits the testimony of a daughter to a confidential communication between a husband and wife in her presence. It has no application to the facts of our case, however. Wolfle did not speak to his wife in the presence of his daughter or any third party; he merely resorted to the mechanical process of reducing his communication to writing before it was delivered to the wife through the instrumentality of a stenographer.

Tutson vs. Holland, referred to in the Solicitor's brief, is likewise not in point. That was a case of a conversation between attorney and client in the presence of the defendant. Certainly if Wolfle

should converse with his wife in the presence of the District Attorney, we should not have the slightest right to claim privilege. Nor does *Coles vs. Harsch*, next cited by the Solicitor, aid in the solution of this problem. The case was one for alienation of affections. It was not the husband who claimed the privilege, but it was the defendant who had won the wife's affections from the husband. The court pointed out that the rule did not exist for the purpose of destroying the marital relationship, but in aid thereof.

Cases cited against the view urged herein, are founded entirely upon the premise that a stenographer taking dictation is a third party, a stranger to the parties composing the confidential relationship. We have pointed out that the principle of privilege involved is one of public policy which applies equally and uniformly to the relationship, whether it be that of physician and patient, attorney and client, or husband and wife. Whatever may have been the case generations ago, it is a step backward to refuse the husband in the law of privilige the right to avail himself of the benefit of modern time-saving methods and devices afforded by stenographic dictation and transcription. We can not close our eyes to the fact that business men frequently and repeatedly dictate and communicate to-

day whether those communications be confidential communications to attorney, doctor or wife. The marital relationship is, if anything, much more essential to the well being of society than any of the other privileged categories.

Libelous Statements Dictated to a Stenographer, Privileged.

Under the great weight of authority today, the dictation of libelous statements to a stenographer, or the delivery of a written libelous communication to a stenographer, clerk, typist, or agent do not constitute delivery or publication and are deemed privileged. This was not always the case. It is a modern growth and development in the law. Lord Escher in a case which for a time gained some support, that of *Pullman vs. Hill,* 1 Q. B. 524 (1891), held that such a communication was not privileged. There the defendant dictated a defamatory communication to his stenographer, who transcribed it on a typing machine. It was then press-copied by the office boy and mailed to the plaintiff. Lord Escher felt that the stenographer had no interest or duty in the matter. He said:

> "If a merchant wishes to write a letter containing defamatory matter and to keep a copy of the letter, he had better keep a copy of it himself. * * * He ought to write the letter

himself and keep it himself, and if he keeps it in a book, he ought to keep the book in his own custody."

This case means that in 1891 Lord Esher did not feel that the practice among business men of dictating letters to their stenographers was sufficiently general to be worthy of judicial cognizance on the part of the courts. He felt rather uncertain of his ground, however, because with a very slight variation of the facts and circumstances in the next case coming before him, that of *Boxius vs. Goblet Freres*, 1894, 1 Q. B. 842, he receded from his position and held that the dictation to the stenographer was on a privileged occasion. This latter case was only three years after the case of *Pullman vs. Hill*. It involved a communication by an attorney on behalf of his client, who communicated a libelous statement to the plaintiff. He held at that time that the dictation to a clerk in the lawyer's office and the copying of a letter into the letter-book by another clerk was privileged. Thus Lord Esher himself was conscious of the growth and development of the practice of dictation in business. *Pullman vs. Hill* was not so decisively overruled at that time that it did not obtain a certain following among a number of courts.

We find in *Puterbaugh vs. Gold Medal Furniture Co.,* (1904), 7 Ont. 582, a Canadian court reluctantly following what it conceived to be the rule of *Pullman vs. Hill.* The case was also followed in *Gambrill vs. Schooley,* 93 Md. 48, and in a number of other American jurisdictions.

The authority of that case was, however, decisively repudiated in *Lawless vs. Anglo-American Cotton Co.,* L. R. 4 Q. B. 262. In 1907 it was completely overruled in the case of *Edmondson vs. Birch,* L. R. 1 K. B. 371, 1907, where it was held that there was no actionable libel in handling a libelous letter to a telegraph operator for transmission. The privilege has been uniformly recognized from that time to this in the English cases.

Odgers in the 6th Edition on "Libel and Slander," p. 135, points out the fallacy of *Pullman vs. Hill.*

The latest case on this subject is that of *Osborn vs. Boulter* (C A. 1930), 2 K. B. p. 226. Scrutton, L. J., said:

> "The letter, however, can give rise to no cause of action, unless it was published to some third party * * *. In my view, on the question of whether privilege is lost by communicating to a staff of clerks the alleged defamatory matter, the rule we have to apply has been laid down by this court, after a consideration of

> *Pullman vs. Hill, in Edmondson vs. Birch* * * *. If the principle is as there laid down, the decision in *Pullman vs. Hill* is merely that in 1890 it was not a usual and reasonable thing for a member of a business firm to dictate a letter containing defamatory statements to, and have it copied by, a clerk * * *. That is a decision of fact * * *. If the principle laid down in those later cases is what we have to apply, how is it to be applied in the present case? * * * Is it lost because in 1930 a man writing such a letter dictates it to a typist, who reads it out of her notes * * *? That appears to me to be a reasonable way of making a communication to another party, even though the letter contains defamatory statements * * *. It seems to me: (1) That the occasion, on which the letter was written was privileged * * *; (3) That the protection of the privileged occasion was not lost by the dictation of the letter to the typist, that being a reasonable and ordinary method in commercial matters of writing letters, even though they may contain defamatory statements."

Greer, L. J., was of the same opinion and he pointed out how, in the process of development, *Pullman vs. Hill* has been discarded; he said:

> "I have come to the conclusion that no one could possibly say that at the present time, or when this letter was written, it was other than a reasonable and usual course of business, for brewers and business people generally, instead of writing business letters in their own hand, to write them through the intermediary of a typist."

These cases present an interesting study in the capacity of the common law to adapt itself to changing conditions and modernizing developments. There is something reminiscent of the days of the stage-coaches and of the quill and pen in the earlier decision of Lord Esher. *Pullman vs. Hill* was, as the courts now remark, a declaration that modern methods had not so far progressed at that time as to warrant a finding that the use of dictation and typing was usual and general throughout the business community. The later cases, however, recognizing it now to be a fact that the convenience of society is immensely served and promoted by the use of these modern methods, demonstrate that the principles of the law of privilege are sufficiently broad to apply to those facts and to preserve the purpose and the object of the law.

Many American cases have adopted the rule of *Edmondson vs. Birch,* repudiating *Pullman vs. Hill,* notably such cases as *Globe Furniture vs. Wright,* (1920), D. C. App., 265 Fed. 873; *Owen vs. Ogilvie,* 53 N. Y. S. 1033 ; *Cartwright vs. Fischel* (1917), Miss., 74 So. 278; *Flynn vs. Reinke,* 225 N. W. 744; and a case from our own jurisdiction (State of Washington), *Prince vs. Holland North America Mortgage Co.,* 107 Wash. 206, 181 Pac. 680.

These modern cases all recognize that clerks, typists, and stenographers are agents and employees, and that a communication to them as such is not a communication or publication to third persons or strangers. The knowledge of the clerks, agents and employees is the knowledge of the principal and that which the principal releases to his agent, clerk or employee, he does not release or publish to third persons or to the world.

This it is shown that the law recognizes this fiduciary relationship between the principal, his clerk, agent, or employee in the case of physician and patient, attorney and client, in the law of libel, and that it would be illogical to do otherwise in the case of husband and wife.

PRIVILEGE CANNOT BE DEFEATED BY SECONDARY PROOF.

Where the law on public policy forbids the production upon the trial of the original of a communication, it will not permit the policy to be evaded by secondary proof of its contents. This principle is self-evident. It has been applied in many instances in the law of privilege. For example, the law upon public policy protects communications made by state officials, no matter how relevant they

may be in subsequent or collateral inquiries, or for that matter even though they may be libelous. Where this is true, the law will not sanction any evasion or indirect attempt to get in proof of the contents of such communications.

Dawkins vs. Rokevy, 1873, 44 L. J. R. Q. B. 63 (Ex.); 45 L. J. R. Q. B. 8 (H. L.)—(the same case on appeal);

Atwood vs. Chapman, 1914, 3 K. B. 275;

Chatterton vs. Sec'y of State, 1895, 2 Q. B. 189, 64 L. J. Q. B. 676;

Bowman vs. Norton, 1931, 5 C. & P. 177.

In *King vs. Upper Bodington, supra*, the court refused to receive testimony by the clerk as to contents of a certain deed, on the ground that the attorney himself could not be permitted to produce the deed and the privilege could not be circumvented by calling upon the attorney's clerk to furnish secondary evidence thereof.

Taylor, in his treatise on "*Evidence*," p. 622, likewise lays down the rule that where communications are privileged, secondary evidence is not compellable. He points out how illusory it would be for the law to say that a party is privileged from producing a deed, but that secondary evidence of its contents can be compelled. The privilege and

the protection undertaken by law would, under those circumstances, he says, be illusory.

> "When the law is restrained by public policy from enforcing the production of papers, a like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents." *Taylor*, Sec. 948.

Appellant has insistently maintained throughout this appeal that since the wife herself was admittedly incompetent to prove the contents of this communication, or to put the communication into evidence, a calling of the defendant's stenographer to prove the contents from her stenographic notes was nothing more than an attempt by the prosecution to do by indirection that which the law directly forbade. The calling of the stenographer to prove the communication presupposed on the face of it that the original was in existence.

Courts Will Not Sanction Evidence Violative of Public Policy or Principles of Law.

It is apparent that the calling of Grace Snyder, secretary and stenographer for the defendant Wolfle, to prove from her shorthand notes the contents of a letter which Wolfle had written to his wife, constitutes an effort to circumvent the rule that a communication from a husband to wife is privi-

leged. If is conceded, of course, that Mrs. Wolfle could not have been called and compelled to produce the letter. The principles we have heretofore mentioned would preclude such an attempt. More important in the eyes of the law than the conviction of Wolfle is the necessity of carrying out the object of the law of privilege: the preservation of the marital relationship and with it the preservation of family life. The law will not permit the prosecution to do that indirectly which it is forbidden to do directly.

Here we have a communication by the defendant Wolfle, a man over 60 years of age, father of two children and the head of a family. The letter in question touches upon some of the most intimate objects of the family relationship—the welfare of his two daughters, their progress in school; his own particular ailments, what the doctor had told him concerning them; his mode of life; his plans for the future; closing with the paragraph which the Government has considered to have been self-incriminating. Can we imagine any communication from husband to wife of a more personal, private and confidential character? This was not such a communication as he intended should have been disclosed or published to the world. He did not intend to tear aside the veil of privacy which speaks forth

from every line of this communication, or to dissolve the confidential privilege which the law has thrown around it.

If the prosecution, by such an artifice as that resorted to in this case, may so easily destroy the privileged relationship, does it not with regard to that relationship "place the liberty of every man in the hands of every petty officer," as James Otis remarked with reference to writs of assistance.

Is it not, as Lord Camden on another occasion declared: "subversive of all of the comforts of society"? Would we not invade "the sanctity of a man's home and the privacies of life"? Would we not violate "the security of private affairs and papers from the inspection and scrutiny of others"? See opinion of Justice Brandeis in *Olmstead vs. U. S.*, 277 U. S. 438, 72 L. Ed. p. 944.

There are many elements of similarity between the case at bar and the case of *Gouled vs. U. S.*, 255 U. S. 298. In the *Wolfle case*, if the normal procedure of law had been pursued and the wife had been called upon to produce the letter, and had done so, and if the communication were otherwise competent evidence, it would have been open to the objection that it would require the defendant to testify against himself. Is it possible for the pros-

ecution thus easily to trample upon fundamental constitutional rights and to compel the defendant to testify against himself by putting in secondary proof of what, in its origin would have been thoroughly objectionable? The *Gouled case* illustrates what we have in mind. There the defendant was convicted, by means in part at least, of a communication which was taken from his possession by a private in the military intelligence corps who gained access to the paper through pretending to be a friend of the defendant. The court held that the seizure by the soldier of this communication was done by stealth, through social acquaintance and under the guise of a business call, and that under such circumstances it was an unlawful seizure. The admission of such a communication in evidence, the Supreme Court held in an opinion by Justice Clarke, compelled the defendant to be a witness against himself in violation of the 5th Amendment. The court regarded it as an invasion of the security and privacy of the home, guaranteed by the 4th Amendment, and as testimony against himself guaranteed by the 5th Amendment. It rendered him the unwilling source of evidence which that amendment forbids. Here in the case at bar the defendant Wolfle found to his surprise upon the trial that, through the medium of his stenographer and private secretary and her

stenographic notes, the Government had obtained, in much the same means as in the *Gouled case*, a copy of this communication of his to his wife. He finds this communication of his being used as a part of the Government's case against himself. The trial court and the Circuit Court assumed that it was unnecessary to concern itself with the source from which this testimony came. "That courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained." It is pertinent here to quote some of the language of Justice Clarke in that decision:

> "While this is a rule of great practical importance, yet after all it is only a rule of procedure and therefore not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case. * * * A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

Here, too, we must consider that the result of the procedure adopted by the prosecution was to evade a very important privilege of the defendant, that of preserving the confidence of a communication from himself to his wife and of preventing it being used as self-incriminating testimony. Under these circumstances everything should

be presumed against the theory that the stenographer and private secretary was at the time of the dictation of this letter a third person or a stranger in the same category as one who overhears a confidential conversation. On the contrary the law should exert itself under these circumstances to promote the accomplishment of the principle involved and not to defeat it.

In the *Olmstead case* above referred to, the majority opinion written by the late Chief Justice Taft, held that evidence obtained by means of tapping wires could be used in court without violating the 5th Amendment against self-incrimination. Chief Justice Taft pointed out that if the communication had been obtained in violation of the privilege of either the 4th or 5th Amendment, under the rule of the *Boyd case*, 116 U. S. 616; the *Weeks case*, 232 U. S. 383; the *Amos case*, 255 U. S. 313, and the *Silverthorne case*, 251 U. S. 385, the use of testimony predicated thereon could not be sanctioned. In other words, if the privilege of the 4th and 5th Amendments were violated and the testimony was surreptitiously or otherwise obtained, the testimony itself would be suppressed and rejected. To do otherwise, the courts of the United States have frequently pointed out, would be, to under-

mine, evade and destroy the privilege of the 4th and 5th Amendments.

Long prior to the adoption of the 4th and 5th Amendments protection was afforded by the very substance of the common law against the use of communications from husband to wife, as well as from client to attorney. The 4th and 5th Amendments did nothing more than to add to those fundamental privileges two others, namely, the privilege against wrongful search and seizure, and the privilege against self-incrimination. If the policy of the law is sound with regard to the refusal to permit an indirect evasion of the privileges created by the 4th and 5th Amendments in order to preserve the purpose contemplated thereby, it is equally true that the courts should protect the immemorial privilege of common law, no less important, against the violation of marital confidences. Justice Brandeis declared of the *Boyd case* that it would be remembered as long as civilized liberty lives in the United States. It was the forerunner of those cases which have insisted that the Government itself is bound by its own Constitution. Likewise it is bound by the substantive law of the land and by all of the recognized principles of the common law, and no stratagem or artifice should be permitted to

wipe out the benefit of the great common law principle affording an absolute privilege for communications between husband and wife.

CONCLUSION.

We have described the history of the privilege of husband and wife, and the purpose and policy which brought it into being as a substantive ingredient of the common law. The same public policy which created the privilege of husband and wife, likewise conferred a privilege upon communications between attorney and client and physician and patient, as well as communications of state officials. The statute of this and other states has in no wise derogated from or altered the common law. The decisions, which in our judgment are supported by the weight of authority and by the best reasoned analysis and which are consonant with the purpose and policy of the law, apply the rule of privilege wherever the communication arises in, or as a result of, the condential relationship. Those cases which deny the privilege under these circumstances, we have pointed out, proceed upon two false premises: First, that the court will not concern itself with the methods in which the communication has been purloined from the parties to

the privilege (the custody rule); and second, that the privilege is in derogation of the general law and is to be strictly construed. These premises are untenable. The courts will carry out the purpose of the law and will protect confidential relationship; and, moreover, courts will liberally apply the rule of privilege, which is not in derogation of the common law, but on the contrary an important substantive part of the body thereof.

Again, we have described the evolution in the law with regard to its attitude toward dictation of communications in the law of libel and defamation. The earlier disposition to deny privilege has been overruled and today courts for the most part recognize that clerks, stenographers and typists are a necessary organ, medium, or instrumentality in the mechanical processes of carrying on such communications. Stenographers and private secretaries are not third parties or strangers, as some of the cases have supposed, but constitute the *alter ego* of the communicant.

We have concluded by pointing out the strong analogy, if not a precise parallel, between the case at bar and cases involving a violation of the privilege of the 4th and 5th Amendments. Under either view such evidence should be excluded.

We respectfully submit that the decision of the Circuit Court of Appeals, if left to stand, would defeat the object, the purpose, and the policy of the law by resorting to an artifice, a stratagem, and a technicality. The wheels of progress cannot be turned backward; correspondence can no longer be carried on by obsolete manual methods. Stenography is one of the recognized agencies by which men today reduce their communications to writing. The law is not helpless to adjust itself to mechanical and commercial advancements. This has been frequently illustrated by decisions of this Court. The principles establishing maximum and minimum wage standards have been harmonized with the legalistic concept of the liberty of contract and similarly as to zoning ordinances, workmen's compensation acts, and many other such modern innovations.

There is no finer or greater object for the solicitude of this Court than the preservation of everything that will tend to encourage and promote family life. This court should, in the judgment of your petitioner, lend its aid to preserve inviolate the intimate and free exchange of confidences between husband and wife. Healthy family life depends upon it. Sound public welfare depends upon wholesome marital felicity. No artifice or innovation,

such as dictation to a stenographer, should be permitted to undermine a structure of common law or destroy a principle vital to our public well-being. Upon these considerations the matter is submitted, with the prayer that the decisions of the District and Circuit Courts be reversed.

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